EDITOR'S NOTE

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Ed Butler
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RESPONSE REQUESTED

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(2)

Supreme Court, U.S.
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NO. 86-1943

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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SUPREME COURT, U.S.

DANIEL McCARTHY,

Petitioner,

vs.

NARDELL U. CARTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, NARDELL U. CARTER, hereby petitions this Court for leave to proceed in forma pauperis.

Respondent was represented in the courts below by counsel appointed pursuant to the Criminal Justice Act of 1954, 18 U.S.C. section 3006A, and was therein permitted to proceed in forma pauperis.

Respectfully submitted,

JOSEPH F. WALSH

WILLIAM K. RASMUSSEN

Attorneys for Respondent
NARDELL U. CARTER

CERTIFICATE OF SERVICE

I, JOSEPH F. WALSH, a member of the Bar of this Court, hereby certify that on August 24, 1987, Respondent's MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

was served upon counsel listed below by depositing copies of same in the United States mail, with first class postage prepaid, addressed as follows:

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JOSEPH F. WALSH

NO. 86-1943

IN THE

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DANIEL McCARTHY,

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OPPOSITION TO

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANIEL McCARTHY, Petitioner, vs. NARDELL U. CARTER, Respondent.	No. 86-1943 OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in Carter v. McCarthy, 806 F.2d 1373 (9th Cir. 1986).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C., section 1254 and Rule 17 of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Where a defendant in a criminal case enters into a plea bargain with a state prosecutor and is promised a specific number of years in custody as his sentence with no mention of parole, may the state authorities unilaterally impose parole status upon that defendant and incarcerate him for a period of time longer than the plea agreement upon a violation of his parole?

STATEMENT OF THE FACTS

In 1981, Respondent Nardell Carter was charged, in thirteen felony counts consolidated into two cases, with forgery and possession of stolen checks. Pursuant to a plea agreement on December 9, 1981, Respondent pleaded guilty in state court to

two counts of forgery and possession of stolen checks, with the understanding that he would receive a prison sentence of two years. The plea agreement did not address the conditions of parole eligibility or release, the prosecutor made no express promise as to parole, and neither the state court nor the prosecutor informed the Respondent that after he had completed the two year sentence he would be placed on parole and that he could receive further time in custody if he violated the terms of his parole.

On January 8, 1982, the trial court imposed a concurrent two-year state prison sentence on each count. On July 2, 1983, Respondent was arrested for residential burglary. He was also discovered in possession of stolen credit cards. He was found to be in violation of parole on September 28, 1983. His parole was revoked, and he was ordered returned to custody for a twelve-month period.

Respondent filed petitions for writ of habeas corpus in the superior court and in the California Court of Appeal. They were denied. Respondent filed a petition for writ of habeas corpus in the United States District Court, Central District of California, on April 30, 1984. On July 29, 1985, the District Court granted the petition for writ of habeas corpus and ordered that Respondent be released from any further parole attributable to his guilty plea.

In September, 1985, Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals held, in a published opinion filed December 23, 1986, that: (1) where a criminal statute imposes a mandatory parole term to be served following completion of the prison sentence, the parole term is a direct consequence of the guilty plea; (2) Respondent's plea was not voluntary and intelligent because he had not been fully aware of the parole period; and (3) the proper remedy was "specific performance" of the agreement, so that Respondent should be released from any further service of the parole term.

ARGUMENT

I

THE STATE'S INCARCERATION OF CARTER AS A PAROLE VIOLATOR RESULTED IN A BREACH OF THE TERMS OF HIS PLEA BARGAIN

Under California law, parole status is an additional punishment for the crime. It is not a procedure whereby the prisoner is released early from incarceration. Penal Code, section 3000(a) provides:

> (a) At the expiration of a term of imprisonment of one year and one day, or a term of imprisonment imposed pursuant to Section 1170, or at the expiration of such term as reduced pursuant to Section 2931, if applicable, the inmate shall be released on parole for a period not exceeding three years, unless the board for good cause waives parole and discharges the inmate from custody of the department.

A violation of parole conditions may lead to a revocation of parole status and the reincarceration of the released prisoner. Penal Code, section 3057(a) provides:

> (a) Confinement pursuant to a revocation of parole in the absence of a new conviction and commitment to prison under other provisions of law, shall not exceed 12 months, except as provided in subdivision (c).

Thus, parole in California is similar to the "special parole" provided for under the federal narcotics offense statute, 21 U.S.C., section 841. See Bifulco v. United States, 447 U.S. 381 (1980). Violation of either parole provisions increases the original sentence imposed by the trial judge.

When a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Santobello v. New York, 404 U.S. 257, 262 (1971); United States v. Benchimol, 738 F.2d 1001, 1002 (9th Cir. 1984); United States v. Garcia, 519 F.2d 1343, 1345 (9th Cir. 1975). The failure of the state to honor its part of the bargain results in a violation of the accused's right to due process of law. The remedy for such a due process violation is either specific performance of the bargain or the accused may withdraw his guilty plea. Santobello v. New York, 404 U.S. 257 (1971).

In Santobello, a defendant agreed to plead guilty to possession of gambling records in exchange for the prosecuting attorney's agreement to make no recommendation as to the sentence. At sentencing, the defendant appeared before a different judge and was opposed by a different prosecuting attorney who recommended a maximum one year sentence. Although the defendant objected to the recommendation, the second prosecutor argued that there was nothing in the record to support the defendant's claim of a promise from the prosecution. The trial judge then sentenced the defendant to the maximum term.

The United States Supreme Court vacated the judgment stating that considerations which justify plea bargaining "presupposes fairness between an accused and a prosecutor." Santobello v. New York, supra, at 261. Among the necessary safeguards, "a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, supra, at 262.

Several cases in the Seventh Circuit have repeatedly held that a state criminal defendant must be specifically advised

that a guilty plea will result in the automatic imposition of a mandatory period of parole. United States ex rel. Johnson v. De Robertis, 718 F.2d 209 (7th Cir. 1983); United States ex rel. Williams v. Morris, 633 F.2d 71 (7th Cir. 1980); United States ex rel. Ferris v. Finkbeiner, 551 F.2d 185 (7th Cir. 1977); United States v. ex rel. Baker v. Finkbeiner, 551 F.2d 180 (7th Cir. 1977)

In United States ex rel. Baker v. Finkbeiner, supra, an Illinois criminal defendant agreed to plead guilty to certain criminal charges in exchange for a promise that he would serve from one to two years in prison. No mention was made of any parole condition during the guilty plea. Illinois law imposed a mandatory two-year term of parole upon a person convicted of the crime to which the defendant entered his guilty plea. The defendant sought federal habeas corpus relief seeking to annul the parole condition.

The Court held that the circumstances surrounding the entry of the plea violated the Due Process Clause if the sentence actually imposed upon the defendant significantly differed from the sentence which had been promised in the plea proceedings by the prosecutor and the trial court. United States ex rel. Baker v. Finkbeiner, supra, at 183. The Court ruled that it was a constitutional violation if the mandatory parole term constituted a "substantial addition" to the prison term promised in the plea bargain. The Court found that the two-year parole term constituted a significant additional punishment. The Court found that the defendant's guilty plea was unfairly induced. United States ex. rel. Baker v. Finkbeiner, supra, at 184. The precise holding of the Court appears at page 184 where the Court states:

> We do not find the imposition of a two-year parole term to be an insignificant punishment. The

conditions of parole place a number of onerous burdens on the liberty of paroled individuals. Moreover, a substantial number of parolees are compelled to return to prison for parole violations. Many of these violations are inevitably technical rather than criminal. This was true in Baker's case, and the consequences were hardly insignificant. Baker served thirty-two months in prison despite the fact that he had been promised a maximum of twenty-four months imprisonment in exchange for his guilty plea. He is still on parole, and could be further incarcerated for another parole violation.

We, therefore, hold that Baker's guilty plea was unfairly induced in violation of the Due Process Clause. The difference between the three to four years in custody he did receive and the one to two years in custody he was told he would receive is substantial enough to justify a finding that he was unfairly compelled to accept the detrimental elements of his bargain without realizing its benefits. (551 F.2d at 184).

When a state prosecutor enters into a plea bargain with a defendant and promises that defendant a certain number of years in custody in exchange for a guilty plea, that plea bargain must be honored by the state. If the prosecutor does not include the parole condition as a part of the plea agreement, the parole condition is not a part of the plea agreement and it cannot be later added to the agreement unilaterally by the state.

Penal Code, section 3000(a) states that a "sentence pursuant to Section...1170 shall include a period of parole, unless waived, as provided in this section." The section then states that parole shall be "for a period not exceeding three

years, unless the [parole] board for good cause waives parole and discharges the inmate from custody of the department." Penal Code, section 3000(a).

Thus, section 3000 of the Penal Code clearly authorizes a "waiver" of the post-incarceration parole period. It is true that only the parole board can waive it, but in this case, the state prosecutor effectively waived the parole period by omitting it in the plea bargain.

There remains the issue of the appropriate remedy in the present case. In this regard, it is well established that plea bargaining, although a matter of criminal jurisprudence, is subject to contract law standards. United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979). In the present matter, Carter has already performed his side of the bargain. As outlined in United States ex rel. Baker v. Finkbeiner, 551 F. 2d 180, 184 (7th Cir. 1977), "Under the circumstances of this case, it would be unjust to simply vacate the guilty plea, which theoretically would allow the state to reindict Baker. Since he has already performed his side of the bargain, fundamental fairness demands that the state be compelled to adhere to the agreement as well." Carter has already served the two year prison term which was his side of the bargain. The state must now adhere to its side of the bargain and Carter's parole status must be declared void.

That is precisely what the courts below in this case have done. The decisions below comply with this Court's decision in Santobello v. New York, 404 U.S. 257 (1971). The state simply bargained away parole status in Respondent's case. The lower courts merely enforced the plea bargain.

CONCLUSION

Based upon the foregoing, Respondent urges the Court to deny the petition for writ of certiorari.

Respectfully submitted,

JOSEPH F. WALSH

WILLIAM K. RASMUSSEN

Attorneys for Respondent
NARDELL U. CARTER

CERTIFICATE OF SERVICE

I, JOSEPH F. WALSH, a member of the Bar of this Court, hereby certify that on August 24, 1987, Respondent's OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was served upon counsel listed below by depositing copies of same in the United States mail, with first class postage prepaid, addressed as follows:

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